Petition

81-1248

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT L. DENNINGHAM,

Petitioner,

vs.

JUDITH DENNINGHAM,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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QUESTIONS PRESENTED

I. Does the entry of a personal judgment against a defendant summoned before a court upon a bill of complaint that does not state a cause of action for such judgment constitute a denial of due process of law in violation of Section 1 of the Fourteenth Amendment to the U.S. Constitution? Does a court that enters a judgment under such circumstances exceed its jurisdiction?

II. Where a state appellate court, upon determining that a trial court's denial of a custody investigation report to a parent in a child custody proceeding is a blatant and grievous error, constituting a denial of due process of law, affirms the custody order of the lower court upon its opinion that the error was harmless; does such affirmation afford the parent the due process denied by the lower court?

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JURISDICTIONAL STATEMENT

The questions presented in this petition arise from three trial court judgments that have been reviewed and affirmed by the Court of Special Appeals of Maryland in *Denningham v. Denningham,* 49 Md. App. 328 (1980), appended hereto. The judgment of that court was filed on July 10, 1981. A petition for certiorari to the Court of Special Appeals was denied by the Court of Appeals of Maryland in an order dated October 7, 1981 (17a). The judgment of the

Court of Special Appeals is thereby that of the highest state court in which a judgment could be had in this case. This petition has been filed within 90 days of the order of the Court of Appeals denying certiorari.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MARYLAND CONSTITUTION, DECLARATION OF RIGHTS.

Article 2. That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the Land.

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MARYLAND CODE: MARYLAND RULES OF PROCEDURE. *Excerpts.*

Rule 370. Bill of Complaint - Petition ..... Equity.

a. Contents - What Required.

2. Statement of Facts - Anticipation of Defense.

A bill or petition shall contain a concise statement of the facts upon which the plaintiff seeks relief, and such averments as may be necessary to entitle him to the relief sought, and, may also contain such facts as are intended to avoid an anticipated defense.

3. Prayer for Relief.

A bill or petition shall also contain prayers specifying particularly the relief sought, which shall be separately numbered, and may also contain a general prayer for such other and further relief as the case may require.

STATEMENT OF THE CASE

In a divorce and custody action a state court entered three decisions that are the concern of this petition: 1) A judgment of $7,670 against petitioner. 2) An order denying petitioner's request to read a custody investigation report. And, 3) An order awarding permanent custody of the parties' two minor children to the respondent.

The action proceeded upon respondent's Supplemental Bill of Complaint for Divorce a Vinculo Matrimonii (18a;-21a).[1] At an evidentiary hearing on June 28, 1979, in the Circuit Court for Prince George's County, Maryland,

[1]Respondent had previously filed a Bill of Complaint for Divorce a Mensa et Thoro, on March 14, 1978. Hence the second bill, filed on November 9, 1978, was given the prefix "supplemental".

respondent alleged that petitioner was $7,670 in arrears on child support obligations provided in a separation agreement executed by the parties. This claim was not raised in the Supplemental Bill of Complaint for Divorce a Vinculo Matrinomii, nor was it raised in the earlier Bill of Complaint for divorce a Mensa et Thoro. Petitioner had no notice that respondent sought a money judgment prior to the claim being raised at the hearing, and was unprepared to defend against it. Counsel for petitioner did not object to the introduction of the money issue into the proceeding.

On July 27, 1979, the court entered a decree that ordered petitioner to pay a judgment of $7,670 to respondent, and deferred a decision on the question of custody to a future time, pending an evaluation of the parties by the Circuit Court Mental Hygiene Consultation Service (12a). At the hearing on June 28th, the court had directed that the report produced by the Mental Hygiene Consultation Service be available for the use of the court and the attorneys only. Petitioner subsequently elected to represent himself in the case and moved for permission to read the report. The motion was denied in an Order of Court dated January 14, 1980 (14a).

The deferred custody hearing was held on September 3-4, 1980, and on October 17, 1980, the court issued an Order which, among other things, awarded permanent custody of the minor children to the respondent (16a).

Petitioner appealed the money judgment, arguing in part that "The trial court denied due process of law to appellant in hearing appellee's claim without prior notice to appellant." *Brief for Appellant and Appendix,* p. 17, Court of Special Appeals of Maryland, September Term, 1980, No. 1602.

Petitioner appealed the Order of Court of January 14, 1980, that denied his motion to read the custody in-

vestigation report, and the Order of October 17, 1980, awarding permanent custody of the minor children to the respondent. In support of these appeals petitioner argued, in part, that he was denied due process of law by the trial court's refusal to permit him to read the custody investigation report. The Court of Special Appeals' opinion coincides with petitioner's assertion on this point. (8a)

The judgments of the trial court were affirmed *in toto* by the Court of Special Appeals. Without reciting petitioner's grounds for appeal from the money judgment in its written opinion, referring to them only as "procedural grounds" (5a), the court dismissed them as being "without merit". (7a) On the custody decision, speaking on the denial of due process, the appellate court said that ". . . the court's error, though of constitutional dimension, was harmless. In order to justify a change of custody, appellant had the heavy burden of demonstrating 'a strong reason affecting the welfare of the child.' *Sartoph v. Sartoph,* 31 Md. App. 58 (1976)." (10a) And, at 11a: "The material contained in the reports at issue here was basically cumulative and introduced nothing new of any significance that was, or could have been, relied upon by the court in determining custody."

It is from the affirmance of the money judgment of July 27, 1979; the Order of Court of January 14, 1980; and the Order of October 17, 1980, that your petitioner seeks a writ of certiorari.

WHY CERTIORARI SHOULD BE GRANTED

1. THE MONEY JUDGMENT.

a. It is open to review by this Court.

Petitioner's averment on appeal from the money judgment that lack of notice was a denial of due process raised the federal question for the first time. The appellate court's rejection of that argument as being "without merit" constitutes an assessment on the merits. A federal question decided against appellant, not on ground that he had not raised it in the lower court, but on its merits, is not too late. *Whitfield v. State of Ohio*, 297 U.S. 431, 436 (1935); *Sully v. American Nat. Bank*, 1978 U.S. 289, 298 (1900). And see, *Pennsylvania R. Co. v. Hughes*, 191 U.S. 477, 484 (1903); *Erie R. co. v. Purdy*, 185 U.S. 148, 154 (1901).

Also, the Court of Special Appeals erred in lumping together petitioner's appeal from the money judgment, and an appeal from an order denying a motion for reduction of the amount of the judgment (the latter not an issue here), concluding that "The trial court made its findings based on disputed evidence, and we find neither clear error in the findings nor an abuse of discretion in the court's declining to revise them." (7a) The resolution of the constitutional question does not rely on disputed evidence, but on the record of the pleadings. The record secured below is adequate for review by this Court.

b. The money judgment conflicts with applicable decisions of this Court and of state courts of appeal.

The money judgment involves a property interest protected by Section 1 of the federal constitution's Fourteenth Amendment, and was decided in a way in conflict with applicable decisions of this Court and of state courts of appeal. A suit for divorce does not automatically place before the court every controversy that exists between the parties, and the parties are not free of the constitutional

mandate to provide the opposite party with due notice of claims and the relief being sought. "Where a husband sues for divorce, the wife may in her answer make a counter claim requesting a judgment for sums due under an agreement which the parties executed before the action was begun." *Morrison v. Morrison*, 158 Fla. 775, 20 So.2d 169 (1947). The Supplemental Bill of Complaint for Divorce a Vinculo Matrimonii is the instrument upon which this action proceeded. It is absent an averment that a sum was due under the separation agreement. Nor does it contain an averment out of which such a claim can be constructed. It is absent a prayer for the money judgment. Neither respondent or the Court of Special Appeals has attempted to show that petitioner's averment of lack of notice is contradicted in the record. "A declaration which fails to allege a fact the existence of which is necessary to enable plaintiff to recover does not state a cause of action." *Sawicki v. Clemons,* 408 Ill. 55, 60, 95 N.E.2d 875, 878 (1950).

It has ever been a tenet of due process in these United States that a court may not deprive a person of property without due notice and a hearing. This Court has declared such notice and hearing to be fundamental to due process. *Boddie v. Connecticut,* 401 U.S. 377, 378 (1970); *Armstrong v. Manzo,* 380 U.S. 545, 550 (1965); *Mullane v. Central Hanover Tr. Co.,* 339 U.S. 306, 314 (1949); *Roller v. Holly,* 176 U.S. 398, 409 (1899). And see, *Milliken v. Meyer,* 311 U.S. 457, 463 (1940); *Grannis v. Ordean,* 234 U.S. 385, 394 (1913).

Speaking on the adequacy of notice, the Court has said it to be manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose. *Roller v. Holly, supra,* at 409, citing *Hagar v. Reclamation District,* 111 U.S. 701, 707

(1883); *Davidson v. New Orleans,* 96 U.S. 97 (1877). At 409 in *Roller,* the Court, quoting 2 Chitty's General Practice, 175, said: "The time appointed must always allow sufficient opportunity between the service of the summons and the time of appearance, to enable the party to prepare his defence and for his journey;" And at 410: "With analogy to other branches of the law, a man should not be required, *omissis omnibus aliis negotiis,* instantly to answer a charge of a supposed offence necessarily less than an indictable misdemeanor, on the same or even the next day, and should be allowed not only time to obtain legal advice and assistance, but also to collect his evidence." In the instant case the court denied petitioner a reasonable opportunity to prepare defenses against the money claim raised fresh at trial. The right to present a defense is rendered nugatory when a court deprives the party of an opportunity to prepare the defense. "The right to a 'full hearing' embraces not only the right to present evidence, but also a reasonable opportunitty to know the claims of the opposing party, and to meet them." *Morgan v. United States,* 304 U.S. 1, 18 (1937).

A consequence of the trial court's entertaining a claim not contained in the pleadings is that the judgment so rendered is a nullity. ". . . 'The courts cannot *ex mero motu,* set themselves in motion, nor have they power to decide questions except such as are presented by the parties in their pleadings. The parties, by their attorneys, make the record, and what is decided within the issue is *res adjudicata*; anything beyond is *coram non judice* and void,' " *State ex rel. v. Muench,* 217 Mo. 124, 138, 117 S.W. 25, 29 (1909), quoting Andrews' Stephen's Pleading, 2d Ed., p. 34. See also, *Noble v. Union River Logging R. Co.,* 147 U.S. 165, 173 (1892); *Reynolds v. Stockton,* 140 U.S. 254 (1890).

2. THE CUSTODY ORDER.

Parental rights are important rights encompassed by the protection of Section 1 of the Fourteenth Amendment. This Court has described those rights as "rights more precious than property rights," *Stanley v. Illinois,* 405 U.S. 645, 651 (1972); *May v. Anderson,* 345 U.S. 528, 533 (1953). The Court of Special Appeals of Maryland affirmed a denial of due process of law in a proceeding that decided petitioner's parental rights. (8a) Petitioner will not attempt by further citation of authority to give additional weight herein to that court's opinion in support of his right to read the custody investigation report and to cross-examine its author. See 49 Md. App. at 336-337. However, the court erred in presuming that because, upon its evaluation of the custody investigation report the material contained therein could not have been relied upon by the trial court in determining custody, the denial of due process was harmless. "The right to procedural due process is 'absolute' in the sense that it does not depend on the merits of a claimant's substantive assertions;" *Carey v. Piphus,* 435 U.S. 247, 266 (1978).

The denial of due process in this case involved the blinding of petitioner to a part of the record upon which the custody decision would be considered. It was not within the power of the Court of Special Appeals to correct this defect in an *ex-parte* deliberation. It was the duty of that court to remand the case to the trial court to allow the litigation to run its course in a proceeding affording the parties due process of law.

At 337 of 49 Md. App. (10a) the appellate court cites as authority for its denial of due process, *Sartoph v. Sartoph,* 31 Md. App. 58 (1976), and at 338 (11a), *Daitoku v. Daitoku,* 39 Hawaii 276 (1952), and cases collected in Annot., *Right In Child Custody Proceedings To Cross-*

Examine Investigating Officer Whose Report Is Used By Court In Its Decision, 59 A.L.R.3d 1137, 1349 (§4). (11a) The court opines that *Sartoph* placed a burden upon petitioner of showing a strong reason affecting the welfare of the children to justify a change of custody. Leaving aside the fact that a *change* of custody was not the issue before the trial court, petitioner avers that the denial of due process precluded the appellate court from reaching the issue it raised by *Sartoph.*

As to *Daitoku* and cases collected in Annot., *supra,*: beyond the fact that these cases are inapplicable because of a wide disparity in the degree of expertise a court must bring to the reports of those cases as compared to the instant case,[2] petitioner contends that the theory of harmless denial of due process is inherently erroneous; that important federal rights are being deprived on authority of these cases; and that this Court ought to review the instant case on the question of whether an appellate court may affirm the denial of due process on the basis of an *ex-parte* determination that the error of the lower court was harmless.

CONCLUSION

In the Virginia Bill of Rights, adopted on June 12, 1776, it is said "That no free government, or blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality and virtue, *and by*

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[2]The report in *Daitoku* involved the inspection of a home by the child and family service prior to a determination as to its suitability as a prospective home for the children of the parties. The report of concern in the instant case was prepared by a psychologist and included results of psychological testing.

frequent recurrence to fundamental principles." (Emphasis added) This petition would argue that the courts below have strayed from the fundamental principle - and constitutional requirement - that no person be deprived of rights that come within the protection of Section 1 of the Fourteenth Amendment, but by due process of law.

For the reasons stated, petitioner urges that a writ of certiorari issue to review the opinion and judgment of the Court of Special Appeals of Maryland.

Respectfully submitted,

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APPENDIX

ROBERT L. DENNINGHAM *v.* JUDITH DENNINGHAM

[No. 1602, September Term, 1980.]

Decided July 10, 1981.

JUDGMENTS — *Entry Of For Child Support Arrearages — Appealability Of — Maryland Rule 605 a — Discussed But Not Applied — Whether Instant Appeal Relative To Entry Of Judgment For Custody Arrearages Was Timely By Virtue Of Maryland Rule 605 a Or Untimely under Maryland Rule 1012 Held Immaterial For Substantively, Chancellor's Findings Were Predicated Upon Controverted Evidence And No Clear Error In His Conclusions, Nor Abuse In His Refusal To Revise Judgment Was Found.* p. 334

CUSTODY OF INFANTS — EVIDENCE — *Custody Investigative Report — Refusal Of Chancellor To Permit Party To View — Absent Consent Or Waiver, It Is Error For Court To Admit And Consider Custody Investigation Report Without Affording Parties Opportunity To Read And Challenge It — Due Process Held To Encompass Principle And To Require That If Chancellor Bases Custody Decision, Even In Part, On Independent Report, Parties Or Their Attorneys Must Have Opportunity To Examine Report And Be Allowed To Cross-Examine Author Of Report And Produce Outside Witnesses To Establish Inaccuracies That Report Might Contain — Held That, In Case At Bar, Although Chancellor Erred In Not Permitting Party To Read Report, It Constituted Error Of Constitutional Dimension However It Was Harmless.* pp. 335-337

H. E. F.

Appeal from the Circuit Court for Prince George's County (WOODS, Robert J., J.).

Bill of complaint filed by Judith Denningham against Robert L. Denningham for divorce *a vinculo matrimonii*, custody of children, support, alimony, etc. From a decree granting the complainant custody and support of the children of the parties and further awarding a money judgment for arrearages in child support payments, respondent appeals.

Judgment affirmed; appellant to pay the costs.

The cause was argued before WILNER, COUCH and MACDANIEL, JJ.

Robert L. Denningham, in proper person, appellant.

Douglas I. Malcom for appellee.

WILNER, J., delivered the opinion of the Court.

The parties to this dispute were married on November 9, 1963. They separated July 15, 1977, have in the meanwhile produced two children — Coren, born 1965, and Elena, born 1968. Prior to their actual separation, they signed a written Separation Agreement providing, among other things, that appellee (the wife) would have custody of the children and that appellant would pay to her $300 every two weeks for their support.

This litigation ultimately proceeded upon appellee's supplemental bill in the Circuit Court for Prince George's County, seeking a divorce *a vinculo matrimonii*, alimony, incorporation of the terms of the separation agreement into the decree, and counsel fees. Virtually everything, including custody, was in dispute. On June 29, 1979, apparently with the acquiescence of both parties, the court ordered its Mental Hygiene Consultation Service to conduct an investigation for the purpose of "evaluating everyone in the Denningham family" and to file a report with the court. It is evident from what subsequently occurred that this investigation, and the report, was ordered primarily in connection with the issues of custody and visitation; and we shall hereafter refer to it as the "custody investigation."

On July 27, 1979, prior to completion of the custody investigation but following an evidentiary hearing, the court proceeded to dispose of the other matters in dispute. It entered a decree that day that (1) granted appellee a divorce *a vinculo matrimonii;* (2) allowed temporary custody of the two minor children of the parties to remain with appellee; (3) determined that a $7,670 judgment be entered against appellant for unpaid child support required by the couple's separation agreement; (4) ordered appellant to pay $433 per month as temporary child support; and (5) required that the parties be evaluated by the Circuit Court Mental Health and

Hygiene Service preparatory to any "final" custody determination.[1]

On August 15, appellant discharged his counsel and advised the court clerk that he would thenceforth be representing himself. On September 20, the court routinely sent a notice to counsel (but not to appellant) advising that the custody investigation report had been received, that "counsel" should contact the Mental Hygiene Consultation Service "for information on this report," and that the matter would be scheduled for further hearing. Appellant, of course, was unaware of the report.

On September 25, 1979, appellant filed a motion to revise the July 27 decree, seeking to reduce the amount of the monetary judgment entered against him therein. On the same day, he noted an appeal to this Court from that decree.[2]

On November 8, 1979, apparently in anticipation of the further proceeding pertaining to custody and visitation, the court filed a "Memorandum of Court," calling attention to the custody investigation report and stating that "[i]nasmuch as this report is confidential and the defendant ... is now representing himself in this matter, the court has decided in all fairness that the contents of the aforementioned report will not be made available to counsel for the plaintiff or the defendant."

The parties returned to court on December 7, 1979, presumably in connection with appellant's motion to revise

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1. It is not clear from the record why this last item was necessary. The order of June 29 ordered the investigation and directed the parties to report to the Service's Intake Office within forty-eight hours. The Service's report, dated September 18, 1979, does not indicate when the interview with the parties occurred.

2. The court's decree was originally dated August 27, 1979, although the docket entries show that it was entered on July 27, 1979. At some point, the error was caught and the court amended the decree by striking the word "August" and inserting the word "July." It is clear that the docket entry is correct and that the decree was actually signed and filed on July 27, 1979. Nevertheless, on October 5, 1979, in consideration of the error, the court issued an order "that the defendant's Order for Appeal filed herein on September 25, 1979, be treated as having been timely filed...." Because appellant's present appeal does not rest upon the September 25 order for appeal, it is not necessary for us to consider whether that order was a valid or proper one. *See* Maryland Rule 1012.

the monetary judgment. In view of appellant's appeal, however, the court declined to consider the motion or even the pending matters of "permanent" custody and visitation. It did consider appellant's request to read the custody investigation report, but again rejected that request. In so doing, it stated "for the record," its reason: "that these reports are confidential, they are not designed for the parties, they are designed for the attorneys. Mr. Denningham was represented during the trial and he is now not represented, and I have decided that in fairness, since the report was prepared for my benefit, *I would read the report and I would not let you read the report, either.*" (Emphasis supplied.)

Appellant dismissed his September 25 appeal to this Court on December 20, 1979. Nothing happened, however, for over eight months. On September 3, 1980, the parties returned to court in connection with the matters of custody, visitation, child support, and appellant's year-old motion to revise the monetary judgment, which motion the court quickly denied. The balance of the two-day proceeding concerned custody and visitation, and was taken up primarily with testimony presented by and on behalf of appellant, whose complaint was that appellee has been endeavoring to alienate the children from him. The court interviewed the children in chambers, alone — apparently without even a court stenographer [3] — and announced that "they are adamant that they want to live with their mother" and that even weekend overnight visits "is going to be difficult for them."

At the conclusion of the proceeding, the court, mentioning both its own interview with the children and the custody investigation report and recommendation,[4] determined that

3. Because the private interview and the exclusion of even a court reporter was without objection and because appellant makes no complaint about it in this appeal, the correctness of that procedure is not before us. We do, however, take this opportunity once again to stress our belief that, even though the parties can affirmatively waive the presence of a reporter, the better practice is to have a reporter present in order that a complete record will be available on appeal. *See Nutwell v. Prince George's County Department of Social Services*, 21 Md. App. 100 (1974).

4. The record reveals that a "follow-up" report was rendered by the Mental Hygiene Consultation Service on November 10, 1980, based upon an interview with the parties and the children on October 16, 1980.

"there really has been no showing that I should take the children away from the mother and place them with [appellant]." On October 17, 1980, the court entered an order awarding permanent custody of the children to appellee, requiring appellant to pay child support of $433 a month, establishing a specific visitation schedule, and directing the Mental Hygiene Consultation Service to review the case in five months and again in ten months.

Appellant responded with a motion for rehearing which was denied on November 3, 1980. The next day, he filed this appeal, raising eight issues that go to virtually everything the court decided. He complains about the money judgment, visitation, custody, and child support on a variety of constitutional, procedural, and substantive grounds. In the interests of clarity, we have divided the issues raised by appellant into two categories — those that question the monetary judgment of July 27, 1979, and those that attack the custody, visitation, and child support decisions.

The Monetary Judgment

Appellant's first three complaints concern the entry of the monetary judgment for child support arrearages. Two of them attack the judgment directly on procedural grounds; the third deals with the court's refusal to grant appellant's motion to set it aside on the ground that the separation agreement from which the judgment arose was induced by fraud.

The money judgment challenged here was part of the July, 1979, divorce decree that resolved all pending matters between the parties except permanent custody,[5] which raises the initial question of whether the current appeal of the money judgment — filed more than a year after that

5. Appellant suggested at oral argument that the issues of child support and visitation were also left unresolved. We do not agree. Naturally, had the court ultimately awarded custody of the children to appellant, adjustments in the child support and visitation orders would have been required; but those matters, as with custody, are always subject to further court order. Insofar as open, current disputes are concerned, the decree settled everything except "permanent" custody.

judgment was entered — is a timely one under Maryland Rules 605a and 1012.

In *Pappas v. Pappas*, 287 Md. 455 (1980), the Court of Appeals reminded both bench and bar that Maryland Rule 605a is a general rule and that it applies to domestic cases. With one possible caveat, which it unfortunately left somewhat imprecise, the Court made clear that a divorce decree which adjudicates less than all of the claims pending before the trial court is not a final and appealable one except to the extent that the determination and direction required under the rule is validly made, and that, unless dealing with an order for which an interlocutory appeal is allowed under Courts article, § 12-303, no part of such a decree may be appealed until finality is achieved through the resolution of the remaining issues.

The caveat referred to appears on p. 463 of 287 Md. The decree at issue in *Pappas* granted a divorce and awarded alimony, child support, guardianship of the minor children, and counsel fees, but reserved ruling on the issues of property division, custody, and the *amounts* of alimony, child support, and counsel fees. Absent a Rule 605a determination and direction, the Court concluded that too much had been left open — that less than all the claims had been decided and that no part of the decree was final or appealable. It then said, however:

> "For purposes of this opinion it is not necessary for us to determine whether the reservation of the amount of counsel fees or the reservation of the amount of alimony and support without more would render the decree other than final. It is sufficient for our purposes to hold that where the issue of property division, the amount of counsel fees, *and* the amount of alimony and support remain to be determined, the judgment was not final." (Emphasis in original.)

The Court did not explain in this caveat what is so special about the *amounts* of support (spousal or child) that might exempt a reservation of those items from the operation of the

rule. Was it suggesting perhaps that those items may be different because they are always subject to the further jurisdiction of the court, and therefore never achieve the status of true finality? If so, it would seem that orders of child custody and visitation should be treated likewise.

Read literally (and until *Pappas* rather consistently), Rule 605 a would seem to admit of no exceptions — that a decree which fails to resolve a pending issue in dispute, whether support or custody, does indeed adjudicate "less than all the claims" and therefore does "not terminate the action as to any of the claims" unless the authorized determination and direction is made. *See Estep v. Estep*, 285 Md. 416, 423-24 (1979).

The Court's suggestion in *Pappas* that there might be exceptions to the rule, at least with respect to support, ought to be clarified. Litigants (and their attorneys) must have some assurance as to whether a divorce rendered by a decree that leaves open an issue of support (or custody or visitation) is or is not final. There is more at stake than the timeliness of appeals, although that, of course, is the heart of the matter.

In this case, it makes no practical difference whether the current appeal is timely. We have examined the substance of appellant's complaints about the money judgment and find them to be without merit. The trial court made its findings based on disputed evidence, and we find neither clear error in the findings nor an abuse of discretion in the court's declining to revise them. Thus, whether the current appeal is timely by virtue of Maryland Rule 605a or untimely by reason of Maryland Rule 1012, appellant will not prevail.

Custody, Visitation, and Child Support

Appellant asserts that the court's decisions on custody, visitation, and child support deprived him of various constitutional rights. Appellee responds that appellant failed to raise these issues below. With one exception,

appellee is correct and we will not consider those issues. Maryland Rule 1085.

The one exception is appellant's assertion that he was denied due process of law when the court considered the custody investigation report in making its custody determination (and the concomitant child support and visitation conclusions) after it had refused to permit him to see the report. We agree that the court erred in that regard.

We must approach the use of custody investigation reports with a certain balance. The opinions of this Court and the Court of Appeals are replete with statements encouraging chancellors to utilize such reports and attesting to their value in arriving at custody determinations. *See, for example, Ouellette v. Ouellette,* 246 Md. 604 (1967); *Shanbarker v. Dalton,* 251 Md. 252 (1968); *Deckman v. Deckman,* 15 Md. App. 553 (1972); *Powers v. Hadden,* 30 Md. App. 577 (1976). *See also* Okpaku, *Psychology: Impediment or Aid in Child Custody Cases,* 29 Rutgers L. Rev. 1117 (1976). Indeed, it is the very reliance placed on these reports that creates the problem.

On the one hand, whether conducted by probation, social service, or medical agencies, custody investigation reports nearly always contain material that is sensitive and highly personal, material that ought to be kept confidential. Medical data, psychiatric opinions, details pertaining to lifestyles and intimate relationships are often recorded, as are the results of interviews with the children whose custody is at issue. That is why, in most cases, these reports are submitted to the court under seal and are dealt with differently than other exhibits in the case. It is also why the court may, in some instances, have a serious concern about allowing even the parties to see the contents of the report.

The counterweight, however, is that these reports consist largely of hearsay declarations — often double- or triple-level hearsay — as well as opinions of various social workers, medical or paramedical personnel, psychologists, teachers, and the like, which may or may not have a reasonable basis. Statements contained in a custody

investigation report have no special indicia of reliability. They are generally not under oath and often emanate from people having overt or covert bias. In many instances, the statements represent subjective feelings and perceptions rather than objective observations or empiric data. Their usefulness to the court is only as strong as their reliability, and that requires that they be subject to challenge in essentially the same manner as any other critical evidence.

We decided as much, at least implicitly, in *Draper v. Draper*, 39 Md. App. 73 (1978). In that case, a custody investigation report recommended that custody be awarded to the father. Counsel for the parties had read the report, although they had not been given copies of it. The father offered the report in evidence without calling its author as a witness, apparently without objection. In her case, the mother sought to call the author for cross-examination, not desiring to vouch for or be bound by the author's testimony. We concluded that the chancellor erred in refusing that request. *See also* Annot., *Right In Child Custody Proceedings To Cross-Examine Investigating Officer Whose Report Is Used By Court In Its Decision*, 59 A.L.R.3d 1337 (1974). Certainly, if it is error to deny the right to cross-examine the author of the report, it is even more blatant and grievous error to hide the report entirely from the parties and yet rely on it in making a decision.

This, indeed, is the uniform view that has been taken wherever the question has arisen. Absent consent or waiver, it is error for a court to admit and consider a custody investigation report without affording the parties an opportunity to read and challenge it. *See Kightlinger v. Kightlinger*, 439 P.2d 614 (Ore. 1968); *Williams v. Williams*, 130 N.E.2d 291 (Ill. App. 1955); *Lewis v. Lewis*, 534 S.W.2d 800 (Ky. 1976); *Gilmore v. Gilmore*, 341 N.E.2d 655 (Mass. 1976); *Mazur v. Lazarus*, 196 A.2d 477 (D.C. 1964); *Scott v. Scott*, 415 A.2d 812 (D.C. 1980); *Oltmanns v. Oltmanns*, 121 N.W.2d 779 (Minn. 1963); *In Re S__ M__ W__*, 485 S.W.2d 158 (Mo. App. 1972); *Hosking v. Hosking*, 318 So.2d 559 (Fla. App. 1975); Comment, *Use of Extra-Record Information in Custody Cases*, 24 U. Chicago L. Rev. 349

(1957); Annot., *Consideration of Investigation by Welfare Agency or the Like in Making or Modifying Award as Between Parents of Custody of Children*, 35 A.L.R.2d 629 (1954). *Cf. Kesseler v. Kesseler*, 225 N.Y.S.2d 1 (N.Y. 1962); *Larson v. Larson*, 140 N.W.2d 230 (Wis. 1966); and *Eastman v. Eastman*, 626 P.2d 1238 (Kan. App. 1981). See also *Cornwell v. Cornwell*, 244 Md. 674 (1966).

These decisions merely make manifest one of the cornerstones of our system of justice: the right of the parties to be aware of all of the evidence considered by the trier of fact in making an adjudicatory determination and to have the opportunity to challenge and answer that evidence. "Due process" encompasses that principle and requires that if a court bases its custody decision, even in part, on an independent report, the parties — or their attorneys — must be given the opportunity to examine the report and must be allowed the opportunity to cross-examine the investigator and to produce outside witnesses to establish any inaccuracies the report may contain. However sensitive the material may be, a party has a right to know what evidence is being considered by the court in judging his cause. A custody case can no more be tried and decided upon secret *ex parte* evidence than any other proceeding.

In this case, however, the court's error, though of constitutional dimension, was harmless. In order to justify a change of custody, appellant had the heavy burden of demonstrating " a strong reason affecting the welfare of the child." *Sartoph v. Sartoph*, 31 Md. App. 58 (1976), *cert. denied*, 278 Md. 732. "The reason for this rule is that the stability provided by the continuation of a successful relationship with a parent who has been in day to day contact with a child generally far outweighs any alleged advantage which might accrue to the child as a result of a custodial change." *Id.* at 67.

The children — daughters aged twelve and fifteen — had been in appellee's custody for the entire three years since the parties separated and, as we have noted, they expressed to the court their clear and unequivocal desire to remain with

appellee. There was no evidence in the case seriously suggesting that they were not being properly cared for or that their needs were not being adequately met.

Unlike many reports of this type, the custody investigation reports in question here relied primarily on interviews with the parents and the two children, and not on the statements or opinions of third parties. They merely recited what the court already knew from its own interviews with the children and from the testimony presented by the parties. The most significant statement in the reports was that the children earnestly desired to remain with their mother, a desire of which appellant was fully aware. The material contained in the reports at issue here was basically cumulative and introduced nothing new of any significance that was, or could have been, relied upon by the court in determining custody. That is why we find, in this particular circumstance, that the error was harmless. *Cf. Daitoku v. Daitoku*, 39 Hawaii 276 (1952) and cases collected in Annot., *supra*, 59 A.L.R.3d 1337, 1349 (§ 4).

Judgment affirmed; appellant to pay the costs.

FILED
JULY 27, 1979
CLERK OF THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MD.

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

JUDITH DENNINGHAM :
Plaintiff :
vs. : Equity No. DR78-859
ROBERT L. DENNINGHAM :
Defendant :

FINAL DECREE OF DIVORCE
A VINCULO MATRIMONII

The above entitled cause having been submitted on Bill of Complaint and Answer and the testimony taken, and the evidence heard in open court, and considered, it is this 27th day of July 1979 by the Circuit Court for Prince George's County, Maryland, sitting as a Court of Equity:

ADJUDGED, ORDERED and DECREED, that the Plaintiff, Judith Denningham, be and she is hereby divorced

ERRATA

p. 2. MARYLAND CONSTITUTION, DECLARATION OF RIGHTS.

Article 2. should be Article 25.

p. 7. Morrison v. Morrison, 158 Fla. 775, 20 So.2d 169 (1947).

should be

Morrison v. Morrison, 158 Fla. 775, 30 So.2d 169 (1947).

A Vinculo Matrimonii from the Defendant, Robert L. Denningham, and it is further,

ORDERED, that the temporary custody of the minor children of the parties be awarded to the Plaintiff, with reasonable rights of visitation reserved unto the defendant, and it is further,

ORDERED, that the defendant pay to the plaintiff the amount of Four Hundred Thirty-three ($433.00) Dollars per month for support and maintenance of the minor children and it is further,

ORDERED, that the parties hereto submit themselves for evaluation by the Circuit Court Mental Health and Hygiene Service and it is further,

ORDERED, that a judgment be entered against the defendant in the amount of Seven Thousand Six Hundred Seventy ($7,670.00) Dollars and it is further,

ORDERED, that this case be set at some time in the future, to futher consider custody, child support and visitation.

/s/ Robert J. Woods

ROBERT J. WOODS, JUDGE

FILED
JAN. 16, 1980
CLERK OF THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MD.

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

JUDITH DENNINGHAM :
Plaintiff :
vs. : Equity No. DR78-859
ROBERT L. DENNINGHAM :
Defendant :

ORDER OF COURT

Upon hearing in open Court on December 7, 1979, and the record herein, it is this 14th day of January, 1980, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that the Defendant's Motion to Read Report be and it is hereby denied, and it is further,

ORDERED, that the Court declines to hear the pending matters on custody and visitation until such time as the pending appeal has been completed.

/s/ Robert J. Woods
ROBERT J. WOODS,
JUDGE

TRUE COPY - TEST: #21
/s/ Norman L. Pritchett
Clerk

/s/ Douglas I. Malcom
DOUGLAS I. MALCOM
Attorney for Plaintiff

Robert L. Denningham,
Pro Se

FILED
OCT. 17, 1980
CLERK OF THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MD.

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

JUDITH DENNINGHAM :
Plaintiff :
vs. : Equity No. DR78-859
ROBERT L. DENNINGHAM :
Defendant :

ORDER

Upon consideration of the testimony taken in open Court, it is, this 17th day of October, 1980, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that the Plaintiff be and she is hereby awarded permanent custody of the minor children, and it is further,

ORDERED, that the Defendant shall pay to the Plaintiff the sum of $433.00 per month as child support, and it is further,

ORDERED, that the Defendant shall have visitation every other weekend as follows: Saturday and Sunday, day

visitation only each alternate visitation period and overnight visitation from Saturday 10:00 a.m. to Sunday 8:00 p.m. each alternating visitation period, and it is further,

ORDERED, that the Circuit Court Mental Hygiene Consultation Service shall review this case in five (5) months and again in ten (10) months from this order, and it is further,

ORDERED, that there shall be a review of visitation on Friday, September 4, 1981.

ROBERT L. DENNINGHAM

v.

JUDITH DENNINGHAM

In the Court of Appeals of Maryland

Petition Docket No. 336 September Term, 1981

(No. 1602, September Term, 1980 Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: October 7th, 1981.

FILED
NOV. 9, 1978
CLERK OF THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MD.

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

JUDITH DENNINGHAM :
6001 Terrell Avenue
Forest Heights, Maryland :

Plaintiff :

vs. : Equity No. DR 78-859

ROBERT L. DENNINGHAM :
3918 - 23rd Parkway, #11
Hillcrest Heights, Maryland
20031 :

Defendant :

SUPPLEMENTAL BILL OF COMPLAINT FOR DIVORCE A VINCULO MATRIMONII

TO THE HONORABLE, THE JUDGES OF SAID COURT:

The Plaintiff, Judith Denningham, respectfully represents unto the Court as follows:

1. That she is an adult citizen of the United States and a resident of Prince George's County, Maryland, residing

therein for more than one year preceding the filing of this action.

2. That the Defendant, Robert L. Denningham, is an adult citizen of the United States and a resident of the State of Maryland.

3. That the Plaintiff and the Defendant were married on November 9, 1963, in Prince George's County, Maryland.

4. That two children have been born as a result of this marriage, namely, Coren Veronica Denningham, born September 1, 1965; and Elena Louise Denningham, born October 11, 1968.

5. That the Plaintiff and Defendant last lived together as husband and wife in the State of Maryland on July 15, 1977, and on said date voluntarily separated by mutual consent and have not lived together nor cohabited as husband and wife since that date and there is no reasonable hope or expectation of reconciliation; the parties thus having voluntarily lived separate and apart for at least twelve (12) months preceding the filing of this Bill of Complaint for Divorce.

WHEREFORE, your Plaintiff respectfully prays:

1. That your Plaintiff, Judith Denningham, may be divorced A Vinculo Matrimonii from the Defendant, Robert L. Denningham.

2. That the terms of the Voluntary Separation Agreement entered into by the parties be incorporated into the Final Decree of Divorce.

3. That the Plaintiff be awarded a reasonable sum for alimony.

4. That the Defendant be ordered to pay Plaintiff's attorney's fees in these proceedings.

5. And for such other and further relief as the nature of this case may require.

/s/ Judith Denningham
JUDITH DENNINGHAM

/s/ Douglas I. Malcom
DOuglas I. Malcom
Attorney for Plaintiff
6200 Annapolis Road, Suite
215
Hyattsville, Maryland
20784
772-0700

therein for more than one year preceding the filing of this action.

2. That the Defendant, Robert L. Denningham, is an adult citizen of the United States and a resident of the State of Maryland.

3. That the Plaintiff and the Defendant were married on November 9, 1963, in Prince George's County, Maryland.

4. That two children have been born as a result of this marriage, namely, Coren Veronica Denningham, born September 1, 1965; and Elena Louise Denningham, born October 11, 1968.

5. That the Plaintiff and Defendant last lived together as husband and wife in the State of Maryland on July 15, 1977, and on said date voluntarily separated by mutual consent and have not lived together nor cohabited as husband and wife since that date and there is no reasonable hope or expectation of reconciliation; the parties thus having voluntarily lived separate and apart for at least twelve (12) months preceding the filing of this Bill of Complaint for Divorce.

WHEREFORE, your Plaintiff respectfully prays:

1. That your Plaintiff, Judith Denningham, may be divorced A Vinculo Matrimonii from the Defendant, Robert L. Denningham.

2. That the terms of the Voluntary Separation Agreement entered into by the parties be incorporated into the Final Decree of Divorce.

3. That the Plaintiff be awarded a reasonable sum for alimony.

4. That the Defendant be ordered to pay Plaintiff's attorney's fees in these proceedings.

5. And for such other and further relief as the nature of this case may require.

/s/ Judith Denningham
JUDITH DENNINGHAM

/s/ Douglas I. Malcom
DOuglas I. Malcom
Attorney for Plaintiff
6200 Annapolis Road, Suite
215
Hyattsville, Maryland
20784
772-0700

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

JUDITH DENNINGHAM	:	
Plaintiff	:	
-vs-	:	Equity No. DR 78-859
ROBERT L. DENNINGHAM	:	
Defendant	:	

FAMILY LAW DIVISION
NOTICE OF HEARING

The Supplemental Bill of Complaint has been set for a hearing before the JUDGE on the 28th day of June, 1979, at 10:00 o'clock A.M.

Counsel's attention is called to 7th Circuit Rule S 80 e (2) requiring counsel in all actions to notify this office of the anticipated length of time that will be required to hear the matter pending. One (1) day hour(s) (has have) been allocated for the hearing and this length of time has been agreed upon by counsel.

The date set for hearing has been confirmed by counsel. Any requests for continuance must be by written petition and order in compliance with Maryland Rule 527 and 7th Circuit Rule 527.

The Master's office has called counsel for both parties (the parties themselves where they appear in proper person) and determined that this is not a matter to be heard by the Master for Domestic Relations Causes pursuant to 7th Circuit Rule S 80 because _____

_____

_____

_____

cc: Douglas I. Malcom, Esquire
Thomas L. Craven, Esquire
3/21/79
shb

PGC# 1699 4/77